

consistent with 5 U.S.C. 603. The analysis is summarized as follows:

This interim rule amends the DFARS to implement Section 801 of the National Defense Authorization Act for Fiscal Year 2004. Section 801 adds 10 U.S.C. 2382, which places restrictions on the consolidation of two or more requirements of a DoD department, agency, or activity into a single solicitation and contract, when the total value of the requirements exceeds \$5,000,000. The objective of the rule is to ensure that decisions regarding consolidation of contract requirements are made with a view toward providing small business concerns with appropriate opportunities to participate in DoD procurements as prime contractors and subcontractors. The rule does not duplicate, overlap, or conflict with any other Federal rules. DoD considers the restrictions on consolidation of contract requirements to be separate and distinct from the restrictions on contract bundling specified in the Federal Acquisition Regulation. There are no significant alternatives that would accomplish the objectives of 10 U.S.C. 2382. The impact on small entities is expected to be positive.

A copy of the analysis may be obtained from the point of contact specified herein. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2003-D109.

### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

### D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 801 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136). Section 801 provides that a DoD department, agency, or activity may not execute an acquisition strategy that includes a consolidation of contract requirements with a total value exceeding \$5,000,000, unless the senior procurement executive

concerned conducts market research, identifies any alternative contracting approaches that would involve a lesser degree of consolidation, and determines that the consolidation is necessary and justified. Comments received in response to this interim rule will be considered in the formation of the final rule.

### List of Subjects in 48 CFR Parts 207 and 219

Government procurement.

**Michele P. Peterson,**

*Executive Editor, Defense Acquisition Regulations Council.*

■ Therefore, 48 CFR parts 207 and 219 are amended as follows:

■ 1. The authority citation for 48 CFR parts 207 and 219 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

### PART 207—ACQUISITION PLANNING

■ 2. Sections 207.170 through 207.170-3 are added to read as follows:

#### 207.170 Consolidation of contract requirements.

##### 207.170-1 Scope.

This section implements 10 U.S.C. 2382.

##### 207.170-2 Definitions.

As used in this section—  
*Consolidation of contract requirements* means the use of a solicitation to obtain offers for a single contract or a multiple award contract to satisfy two or more requirements of a department, agency, or activity for supplies or services that previously have been provided to, or performed for, that department, agency, or activity under two or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited.

*Multiple award contract* means—

(1) A multiple award schedule issued by the General Services Administration as described in FAR Subpart 8.4;

(2) A multiple award task order or delivery order contract issued in accordance with FAR Subpart 16.5; or

(3) Any other indefinite-delivery, indefinite-quantity contract that an agency enters into with two or more sources for the same line item under the same solicitation.

##### 207.170-3 Policy and procedures.

(a) Agencies shall not consolidate contract requirements with a total value exceeding \$5,000,000 unless the acquisition strategy includes—

(1) The results of market research;  
(2) Identification of any alternative contracting approaches that would involve a lesser degree of consolidation; and

(3) A determination by the senior procurement executive that the consolidation is necessary and justified.

(i) Market research may indicate that consolidation of contract requirements is necessary and justified if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches. Benefits include costs and, regardless of whether quantifiable in dollar amounts—

- (A) Quality;
- (B) Acquisition cycle;
- (C) Terms and conditions; and
- (D) Any other benefit.

(ii) Savings in administrative or personnel costs alone do not constitute a sufficient justification for a consolidation of contract requirements unless the total amount of the cost savings is expected to be substantial in relation to the total cost of the procurement.

(b) Include the determination made in accordance with paragraph (a)(3) of this section in the contract file.

### PART 219—SMALL BUSINESS PROGRAMS

■ 3. Section 219.201 is amended by adding paragraph (d)(11) to read as follows:

#### 219.201 General policy.

\* \* \* \* \*

(d) \* \* \*

(11) Also conduct annual reviews to assess—

(A) The extent of consolidation of contract requirements that has occurred (see 207.170); and

(B) The impact of those consolidations on the availability of small business concerns to participate in procurements as both contractors and subcontractors.

\* \* \* \* \*

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## DEPARTMENT OF DEFENSE

### 48 CFR Parts 209, 217, and 246

[DFARS Case 2003-D101]

### Defense Federal Acquisition Regulation Supplement; Quality Control of Aviation Critical Safety Items and Related Services

AGENCY: Department of Defense (DoD).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 802 of the National Defense Authorization Act for Fiscal Year 2004. Section 802 requires DoD to establish a quality control policy for the procurement of aviation critical safety items and the modification, repair, and overhaul of those items.

**DATES:** *Effective date:* September 17, 2004.

*Comment date:* Comments on the interim rule should be submitted to the address shown below on or before November 16, 2004, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2003–D101, using any of the following methods:

○ Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

○ Defense Acquisition Regulations Web Site: <http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm>. Follow the instructions for submitting comments.

○ E-mail: [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2003–D101 in the subject line of the message.

○ Fax: Primary: (703) 602–7887; Alternate: (703) 602–0350.

○ Mail: Defense Acquisition Regulations Council, Attn: Ms. Teresa Brooks, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.

○ Hand Delivery/Courier: Defense Acquisition Regulations Council, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

All comments received will be posted to <http://emissary.acq.osd.mil/dar/dfars.nsf>.

**FOR FURTHER INFORMATION CONTACT:** Ms. Teresa Brooks, (703) 602–0326.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This interim rule amends DFARS Parts 209, 217, and 246 to implement Section 802 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108–136). Section 802 requires DoD to prescribe in regulations a quality control policy for the procurement of aviation critical safety items and the modification, repair, and overhaul of those items. This interim rule—

○ Identifies the responsibilities of the head of the design control activity for quality control of aviation critical safety items and related services; and

○ Specifies that DoD may enter into a contract for the procurement, modification, repair, or overhaul of an aviation critical safety item only with a source approved by the head of the design control activity.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**B. Regulatory Flexibility Act**

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule primarily relates to internal DoD responsibilities for ensuring quality control in the procurement of aviation critical safety items and related services. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2003–D101.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**D. Determination To Issue an Interim Rule**

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 802 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108–136). Section 802 requires DoD to prescribe in regulations a quality control policy for the procurement of aviation critical safety items and the modification, repair, and overhaul of those items. Section 802 became effective upon enactment on November 24, 2003. Comments received in response to this interim rule will be considered in the formation of the final rule.

**List of Subjects in 48 CFR Parts 209, 217, and 246**

Government procurement.

**Michele P. Peterson,**

*Executive Editor, Defense Acquisition Regulations Council.*

■ Therefore, 48 CFR parts 209, 217, and 246 are amended as follows:

■ 1. The authority citation for 48 CFR parts 209, 217, and 246 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

**PART 209—CONTRACTOR QUALIFICATIONS**

■ 2. Sections 209.270 through 209.270–4 are added to read as follows:

**209.270 Aviation critical safety items.**

**209.270–1 Scope.**

This section—

(a) Implements Section 802 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108–136); and

(b) Prescribes policy and procedures for qualification requirements in the procurement of aviation critical safety items and the modification, repair, and overhaul of those items.

**209.270–2 Definitions.**

As used in this section—

*Aviation critical safety item* means a part, an assembly, installation equipment, launch equipment, recovery equipment, or support equipment for an aircraft or aviation weapon system if the part, assembly, or equipment contains a characteristic any failure, malfunction, or absence of which could cause—

(1) A catastrophic or critical failure resulting in the loss of or serious damage to the aircraft or weapon system;

(2) An unacceptable risk of personal injury or loss of life; or

(3) An uncommanded engine shutdown that jeopardizes safety.

*Design control activity* means the systems command of a military department that is specifically responsible for ensuring the air worthiness of an aviation system or equipment in which an aviation critical safety item is to be used.

**209.270–3 Policy.**

(a) The head of the contracting activity for an aviation critical safety item may enter into a contract for the procurement, modification, repair, or overhaul of such an item only with a source approved by the head of the design control activity.

(b) The approval authorities specified in this section apply instead of those otherwise specified in FAR 9.202(a)(1), 9.202(c), or 9.206-1(c), for the procurement, modification, repair, and overhaul of aviation critical safety items.

#### 209.270-4 Procedures.

For items identified as aviation critical safety items—

(a) The head of the design control activity shall—

(1) Approve qualification requirements in accordance with procedures established by the design control activity; and

(2) Qualify and identify aviation critical safety item suppliers and products.

(b) The contracting officer shall—

(1) Ensure that the head of the design control activity has determined that a prospective contractor or its product meets or can meet the established qualification standards before the date specified for award of the contract;

(2) Refer any offers received from an unapproved source to the head of the design control activity for approval. The head of the design control activity will determine whether the offeror or its product meets or can meet the established qualification standards before the date specified for award of the contract; and

(3) Refer any requests for qualification to the design control activity.

(c) See 246.407 (S-70) and 246.504 for quality assurance requirements.

#### PART 217—SPECIAL CONTRACTING METHODS

■ 3. Section 217.7501 is amended in paragraph (b)(2) by adding a third sentence to read as follows:

##### 217.7501 General.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \* See 209.270 for requirements applicable to replenishment parts for aviation critical safety items.

\* \* \* \* \*

#### PART 246—QUALITY ASSURANCE

■ 4. Section 246.407 is amended by adding, after paragraph (f)(iii), a new paragraph (S-70) to read as follows:

##### 246.407 Nonconforming supplies or services.

\* \* \* \* \*

(S-70) The head of the design control activity is the approval authority for acceptance of any nonconforming aviation critical safety items or

nonconforming modification, repair, or overhaul of such items (see 209.270).

■ 5. Subpart 246.5 is added to read as follows:

#### Subpart 246.5—Acceptance

Sec.

246.504 Certificate of conformance.

##### 246.504 Certificate of conformance.

Before authorizing a certificate of conformance for aviation critical safety items, obtain the concurrence of the head of the design control activity (see 209.270).

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#### DEPARTMENT OF DEFENSE

##### 48 CFR Parts 225 and 252

[DFARS Case 2003-D099]

##### Defense Federal Acquisition Regulation Supplement; Berry Amendment Changes

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

**SUMMARY:** DoD has adopted as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Sections 826 and 827 of the National Defense Authorization Act for Fiscal Year 2004. Sections 826 and 827 provide exceptions to the domestic source requirements of the Berry Amendment. Section 826 applies to the acquisition of food, specialty metals, and hand or measuring tools needed to support contingency operations or to fulfill other urgent requirements. Section 827 applies to the acquisition of waste and byproducts of cotton or wool fiber for use in the production of propellants and explosives.

**EFFECTIVE DATE:** September 17, 2004.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, Defense Acquisition Regulations Council, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0328; facsimile (703) 602-0350. Please cite DFARS Case 2003-D099.

##### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD published an interim rule at 69 FR 26508 on May 13, 2004, to implement Sections 826 and 827 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136). The rule amended DFARS 225.7002-2

and 252.225-7012 to provide new exceptions to the domestic source requirements of the Berry Amendment (10 U.S.C. 2533a), as authorized by Sections 826 and 827 of Public Law 108-136. DoD received no comments on the interim rule. Therefore, DoD has adopted the interim rule as a final rule without change.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

##### B. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the exceptions to domestic source requirements authorized by the rule are limited to acquisitions of (1) Food, specialty metals, and hand or measuring tools needed to support contingency operations or to fulfill other urgent requirements; and (2) waste and byproducts of cotton or wool fiber for use in the production of propellants and explosives.

##### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

##### List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

##### Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 225 and 252, which was published at 69 FR 26508 on May 13, 2004, is adopted as a final rule without change.

Michele P. Peterson,

*Executive Editor, Defense Acquisition Regulations Council.*

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#### DEPARTMENT OF DEFENSE

##### 48 CFR Parts 226 and 252

[DFARS Case 2002-D033]

##### Defense Federal Acquisition Regulation Supplement; Indian Incentive Program

AGENCY: Department of Defense (DoD).

ACTION: Final rule.